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PP

v.

ASNAWI YUSUF

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COURT OF APPEAL, PUTRAJAYA
HASAN LAH JCA
SULONG MATJERAIE JCA
HISHAMUDIN MOHD YUNUS JCA
[CRIMINAL APPEAL NO: J-05-99-2006]
2 JUNE 2011

C

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 28,666 grams cannabis - Appeal against acquittal and discharge - Failure to secure attendance of three witnesses offered to defence by prosecution - Whether testimony of witnesses crucial to defence case - Whether failure to secure attendance of witnesses occasioned miscarriage of justice - Whether respondent raised a reasonable doubt over prosecution's case*

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CRIMINAL PROCEDURE: *Trial - Failure to secure attendance of witnesses - Witnesses offered to defence by prosecution and crucial to defence case - Whether respondent's acquittal and discharge by High Court proper - Whether appeal to be dismissed*

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This was an appeal by the Public Prosecutor against the acquittal and discharge of the respondent by the trial judge on a charge of trafficking in 28,666 grams cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952. The trial judge held that the prosecution had failed to secure the attendance of three witnesses offered to the defence at the close of the prosecution's case. The trial judge was of the view that their evidence was important in establishing the existence of a third party, one Fakrullah, claimed by the respondent to have played a major role in the drug transaction that led to his arrest. Hence, the respondent had raised a reasonable doubt over the case for the prosecution.

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Held (dismissing the appeal by the Public Prosecutor)
Per Sulong Matjeraie JCA delivering the judgment of the court:

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(1) When witnesses were offered by the prosecution to the defence at the end of the case for the prosecution, it was the bounden duty of the prosecution to avail those witnesses for the defence. If in the exercise of that duty, the prosecution

failed to fulfill that obligation, the accused must be acquitted. In the present case, the three witnesses were offered to the defence by the prosecution. The defence too had alerted the prosecution of their wish to call them and that made it all the more imperative for the prosecution to avail them. The reason proffered by the prosecution that they could not be traced as they were Indonesians was simply untenable and indefensible particularly in this case which involved the liberty of an individual. (paras 23 & 25)

- (2) It was in evidence that the three witnesses were arrested and brought to the police station. They were important and material witnesses to the defence of the respondent as they were the only people who could testify and establish the existence of Fakrullah. The respondent was innocent until proven guilty and he must be given every opportunity to substantiate his story. Without those three witnesses, the respondent would not be able to do so. The failure by the prosecution to secure their attendance once they were offered as witnesses to the defence, had occasioned a miscarriage of justice. Further, there was a doubt in the prosecution's case as the testimonies of the three witnesses were required to establish the existence of Fakrullah and the role he played in this case. (paras 24-26 & 29)

Bahasa Malaysia Translation Of Headnotes

Ini adalah rayuan pendakwa raya terhadap pembebasan dan pelepasan responden oleh hakim bicara atas tuduhan pengedaran 28,666 gram kanabis di bawah s. 39B(1)(a) Akta Dadah Berbahaya 1952. Hakim bicara telah mendapati bahawa pihak pendakwaan gagal untuk memperolehi kehadiran tiga saksi yang telah ditawarkan kepada pihak pembelaan pada penutupan kes pendakwaan. Hakim bicara berpendapat bahawa keterangan mereka penting untuk membuktikan kewujudan pihak ketiga, iaitu seorang Fakrullah, yang didakwa responden telah memainkan peranan utama dalam transaksi dadah yang telah membawa kepada penangkapan responden. Maka, responden telah berjaya menimbulkan keraguan yang munasabah ke atas kes pendakwaan dalam pembelaannya.

**A Diputuskan (menolak rayuan pendakwa raya)
Oleh Sulong Matjeraie HMR menyampaikan penghakiman mahkamah:**

- B** (1) Apabila saksi-saksi ditawarkan oleh pihak pendakwaan kepada pihak pembelaan pada penutupan kes pendakwaan, ianya adalah kewajipan pihak pendakwaan untuk memastikan kehadiran saksi-saksi tersebut bagi pihak pembelaan. Jika dalam pelaksanaan kewajipan tersebut, pihak pendakwaan gagal menunaikan kewajipan tersebut, tertuduh mesti dilepaskan.
- C** Dalam kes semasa, ketiga-tiga saksi tersebut telah ditawarkan kepada pihak pembelaan. Pihak pembelaan juga telah memberitahu pihak pendakwaan keinginan pihak pembelaan memanggil saksi-saksi tersebut dan itu menjadikannya lebih wajib lagi bagi pihak pendakwaan memperolehi kehadiran saksi-saksi tersebut.
- D** Alasan yang diberi oleh pihak pendakwaan bahawa saksi-saksi tersebut tidak boleh dikesan kerana mereka orang Indonesia tidak boleh dipertahankan dan tidak boleh dibelakan, lebih-lebih lagi kerana kes semasa berkenaan kebebasan seorang individu.
- E** (2) Keterangan menunjukkan bahawa ketiga-tiga saksi telah ditangkap dan dibawa ke balai polis. Mereka adalah mustahak dan penting kepada pihak pembelaan disebabkan merekalah yang hanya boleh memberikan keterangan berkenaan kewujudan Fakrullah tersebut. Responden tidak bersalah hingga
- F** dibuktikan salah dan dengan itu dia mesti diberikan setiap peluang yang ada untuk menguatkan kesnya. Tanpa saksi-saksi tersebut, responden tidak boleh berbuat demikian. Kegagalan pihak pendakwaan memperolehi kehadiran saksi-saksi tersebut selepas menawarkan mereka kepada pihak pembelaan telah
- G** mengakibatkan satu salah laksana keadilan. Selain itu, terdapat keraguan atas kes pihak pendakwaan kerana testimoni ketiga-tiga saksi tersebut diperlukan untuk membuktikan kewujudan Fakrullah dan peranan yang dimainkannya dalam kes ini.

H Case(s) referred to:
Maxwell v. DPP [1934] All ER (Rep) 168 (refd)

Legislation referred to:
Dangerous Drugs Act 1952, s. 39B(1)(a)

- I** *For the appellant - How May Ling DPP*
For the respondent - G Subramaniam Nair (Ebrina Zubir with him);
M/s Maniam Nair & Co

Reported by Usha Thiagarajah

JUDGMENT

A

Sulong Matjeraie JCA:

[1] This is the judgment of this court on an appeal by the public prosecutor against the decision of the learned High Court judge who acquitted and discharged the accused at the end of the defence case.

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Background

[2] The respondent, Asnawi bin Yusuf, was charged under s. 39B(1)(a) of the Dangerous Drugs Act 1952 for the offence of trafficking, to wit 28,666 grams of cannabis at Jalan Permas 10/10, Bandar Baru Permas Jaya in Johor Bahru on 14 March 2002.

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[3] The respondent pleaded not guilty and the trial proceeded at the High Court at Johor Bahru. The prosecution called seven witnesses and at the close of the prosecution's case, the learned High Court judge found that a *prima facie* case had been made out and called the respondent to enter his defence under s. 39B(1)(a) of the Dangerous Drugs Act 1952. After the respondent had given his sworn evidence in court, the learned High Court judge decided that the respondent had raised a reasonable doubt in the prosecution case and acquitted and discharged him on charges of trafficking.

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Facts Of The Case

[4] The essential facts of the case led by the prosecution and relevant to this appeal may be summarised as follows.

[5] One Detective Corporal Ramli bin Saad (SP3) from Bahagian Risikan Narkotik Bukit Aman, Kuala Lumpur was contacted on 1 March 2002 by an informer who wanted to introduce him to a supplier of cannabis in Johor Bahru. The following day SP3 went with Kpl Abdul Rahim bin Kiran (SP6) to Johor Bahru where SP3 met the informer and an Indonesian supplier called "Awi", the respondent.

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[6] A discussion ensued between SP3 and the respondent wherein the latter confirmed that he could supply 30 kilos of cannabis at a rate of RM1,000 per kilogram and promised to get in touch with SP3 once supply was available.

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- A** [7] SP3 and SP6 returned to Kuala Lumpur and briefed SP4, ASP Zubir bin Ayob on the discussion and negotiation. A few days later, the respondent contacted SP3 by telephone saying that the cannabis was available and was ready for collection. SP3 informed SP4 who instructed that an operation be carried out.
- B** [8] This resulted in SP4 leading a police party to Johor Bahru. The members comprised of SP3, SP6, Chief Inspector Mohd Alpiyang bin Ali, D/Sjn Abd Hamid bin Ujang, RF 114564 Rusli bin Johar, RF 118379 Mohd Jaini bin Haji Othman and RF 115915 Mohd Zin bin Pengcheng.
- C** [9] On 13 March 2002 SP3 contacted the respondent and made arrangements to meet him at Restoran Sri Alam, Permas Jaya (“the said restaurant”) at 8pm. The respondent said that the supply was ready and SP3 said he would be collecting the 30 kilograms of cannabis near the said restaurant between 9pm to 10pm the next day.
- D** [10] Briefing was held with the members of the police party involved in the operation and with SP3 and SP6 passing themselves out as the “purchasers of cannabis”. A sum of RM30,000 was handed over to SP3 and SP6 as “flash role” to convince the respondent of the purchase. The next day at about 9.30pm members of the police party took up their respective positions near the said restaurant.
- E** [11] At about 10pm the respondent arrived and sat down with SP3 in the said restaurant. He said that the supply was ready but he wanted to see the money first. SP3 brought him to the car where SP6 was seated and showed him the money which were in a bag. Thereafter the respondent left riding a motorcycle. SP3 returned to the said restaurant while SP6 drove the car to the back of the said restaurant.
- F**
- G**
- H** [12] The respondent came back at 11.30pm, driving a white Proton Iswara bearing registration plate No. JCS 5739 and after parking his car he went to meet SP3 at the said restaurant. Both of them then proceeded to the respondent’s car. The respondent opened the back door and showed SP3 the bag which was placed at the back seat. He opened the bag and asked SP3 to look at the contents therein. SP3 saw the black bag and a packet of dried leaves suspected to be ganja. The respondent informed SP3 that there were 20 of them in the bag while ten in the plastic bag at the front passenger seat.
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[13] Having satisfied himself that the incriminating drugs were ganja SP3 contacted SP6 to bring over the money. SP6 then contacted SP4 who instructed the raiding police party to move in resulting in the arrest of the respondent. **A**

[14] Upon a body search made on the respondent, a Proton car key (P15) was found in the pocket of his trousers. SP4 went to the car and found that it was not locked. He saw the plastic package (P20) at the front passenger seat and upon searching the same he found ten plastic packets (P20A-J) containing dried leaves suspected to be ganja. At the back seat he saw the “Silver Hawk” bag (P21) and in it 20 plastic packets (P21A-T) were found and they contained dried leaves suspected to be ganja. **B**
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[15] SP4 handed over the exhibits seized to the investigating officer, Chief Inspector Rejali ak Angong (SP7) who handed the incriminating drugs over to the Chemist, Soupy bin Daud (SP5) whose analysis confirmed the incriminating drugs to be 28,666 grams of cannabis. The chemist report confirming the same was tendered as exh. P28. **D**

Evidence Of The Respondent

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[16] During examination-in-chief the respondent gave evidence under oath as follows:

- (1) He arrived in Malaysia in 1991. In 1997 he went back to Ambon and later returned to Malaysia. From January to March 2002 he stayed at Taman Saujana, Johor Bahru together with his brother-in-law one, Eddy Shahputra. The tenants of the adjacent house were Abdul Rahman and M. Dahlan. One Fakrullah used to come to his house for a chat. He used to come about three times a month. **F**
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These details are reflected at p. 58 of the Appeal Record viz:

... Saya bekerja repair rumah di JB pada Jan-Mac 2002 - tiada ada pas pekerja. Rumah saya tinggal tidak bernombor - sewa dari seorang Melayu nama tidak tahu. **H**

Adik ipar saya bernama Edy Shahputra tinggal bersama saya. Di rumah sebelah penyewa adalah Abdul Rahman dan M. Dahlan. Rumah sebelah bersambung. Fakrullah ada datang ke rumah 3 kali sebulan. Dia datang untuk berbual biasa. **I**

- A (2) Sometime in February 2002 Fakrullah brought the respondent on a motorcycle to a restaurant at Taman Harmoni, Johor Jaya where he met two Malay males. He forgot their names. For 20 minutes they sat together and talked but he could not fully understand them. He did not concentrate on what was discussed. Later Fakrullah sent him home on a motorcycle. The testimony of the respondent at p. 58 of the Appeal Record was recorded as follows:
- B
- C Pada bulan Februari 2002 (hari tak ingat) **Fakrullah ada datang ke rumah dan ajak saya ke restoran di Johor Jaya, Taman Harmoni naik motorsikal.** Taman Harmoni sebelah Taman Saujana.
- D **Fakrullah jumpa 2 lelaki Melayu di restoran** (nama tak ingat). Saya duduk bersama tapi kurang faham apa yang dipercakapkan. Duduk lebih kurang 20 minit. Tidak tumpukan perhatian apa yang dibincang.
- E Selepas itu balik rumah ditumpang motosikal yang dipandu oleh Fakrullah.
- E Tidak kenal 2 lelaki Melayu yang bincang dengan Fakrullah - tidak cam mereka. (emphasis added).
- F (3) Sometime in March 2002 at 9pm Abdul Rahman together with Fakrullah came to his house in a white Proton Iswara bearing registration No. JCS 5739. Fakrullah asked the respondent to drive him to Permas Jaya in the said car which he believed belonged to Abdul Rahman. He was promised by Fakrullah RM300 to drive the car as he (Fakrullah) was afraid to drive along the highway. At p. 61 of the Appeal Record the accused testified as follows:
- G Fakrullah tidak memandu kereta ke Permas Jaya malam itu kerana dia tidak berani memandunya di jalan besar. Fakrullah berjanji memberi saya RM300.00 jika memandu kereta ke Permas Jaya.
- H (4) Along the journey, Fakrullah requested the respondent to stop the car near some bushes by the side of a road at Kampong 10, Taman Harmoni. Fakrullah got out of the car and took two packages from the bushes: one white and the other black in colour. The white package was placed by him on the floor of the front passenger's seat and the black package was placed on the back seat. Fakrullah then got into the car and sat on the left side of the back seat. The respondent was directed to drive to Permas Jaya.
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- (5) On arrival at Permas Jaya the respondent was asked to stop beside a restaurant. It was a dark car parking area. Fakrullah then went into the restaurant while the respondent was asked to wait near the car. **A**
- (6) While waiting outside the car, a Malay man approached the car and opened the rear door of the car near where the respondent stood. At the same time, a car with five occupants approached him and the occupants jumped out of the car and assaulted him. The respondent fell and was arrested and handcuffed. **B**
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- (7) The respondent denied that he knew the contents of the packages seized by the police and when questioned by them he answered “kereta ini Abdul Rahman punya. Beg-beg Fakrullah punya.” On being questioned further as to the whereabouts of Fakrullah and Abdul Rahman the respondent answered that Abdul Rahman was at home. He also informed the police that Fakrullah was with him earlier and had run away. **D**
- (8) The respondent was taken by the Police to the house at Taman Saujana to search for Abdul Rahman. **E**
- (9) Abdul Rahman, Edy Shahputra and M Dahlan were in the house and were brought to the Police Station at Plentong and were detained there together with the respondent. Fakrullah was not in the house. **F**
- [17]** Although the prosecution appealed and argued on several grounds, we consider that pivotal to this appeal is the issue that relates to the failure of the prosecution to make available to the defence three witnesses, namely, Abdul Rahman, Eddy Shahputra and M Dahlan offered to the defence at the close of the prosecution case. It cannot be over emphasized here that all of them had earlier on been detained by the Police together with the respondent. **G**
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- [18]** It was the view of the learned trial judge that the failure of the prosecution to make available the three missing witnesses offered to the defence at the close of the prosecution case raised a reasonable doubt on the prosecution case. The learned trial Judge felt that their production would go towards establishing the existence of Fakrullah and the role played by him and consequently raising a doubt in the prosecution case. We agree with the findings made by the learned trial judge. **I**

- A [19] The appeal by the public prosecutor hinges on this singular issue.

Evidence Of The Respondent As Found In The Appeal Record

- B [20] What is obvious from the testimony given is that the respondent shares the house with his brother in law, Edy Shahputra. He had two other neighbours, namely, Abdul Rahman and M Dahlan. At the end of the prosecution case, all the three of them were offered to the defence as reflected at p. 51 of the Appeal Record which reads as follows:

- D Pendakwaan menutup kes dan menawarkan C/Insp Mohd Alpiyang, D/Sjn Abdul Hamid Ujang, D/Mohd Zin bin Pengcheng, D/Mohd Jaini Othman, D/Rusli bin Johar, Insp Arman bin Ibrahim, **M Dahlan, Edy Shahputra dan Abdul Rahman bin Mohamad.** (emphasis added)

- E [21] This prompted learned counsel for the respondent to immediately respond on 6 December 2005 that should defence be called, the defence would require, Chief Inspector Mohd Alpiyang, M Dahlan, Edy Shahputra and Abdul Rahman bin Mohamad. At p. 51 of the Appeal Record the following was recorded:

- F Peguambela - saya memerlukan C/Insp Mohd Alpiyang, **M Dahlan, Edy Shahputra dan Abdul Rahman bin Mohamad** dan Insp Arman bin Ibrahim jika pembelaan dipanggil. (emphasis added)

- G [22] Learned defence counsel gave ample warning to alert the court and especially to the learned Deputy Public Prosecutor that it was his intention to call those witnesses including, but not limited to, M Dahlan, Edy Shahputra and Abdul Rahman.

- H [23] Now, perhaps curiously, when learned defence counsel wanted the above-named three witnesses to testify, the public prosecutor said that all of them were not available. The reason proffered was that they cannot be traced as they are Indonesians! Such reason is simply untenable and indefensible particularly in a case involving the liberty of an individual. We have provisions in our laws to ensure that this should not have happened. It is clear law that when witnesses are offered by the prosecution to the defence at the end of the case for the prosecution, it is the bounden duty of the prosecution to avail these witnesses for the defence. If in the exercise of this duty, the prosecution fails to fulfill this obligation, the accused must be acquitted.

[24] It was in evidence that the so-called three Indonesians, Abdul Rahman, Edy Shahputra and M Dahlan (“the missing three witnesses”) were arrested and brought to the Plentong Police Station, see p. 61 of the Appeal Record. **A**

[25] The three missing witnesses are important and material witnesses to the defence of the respondent in that they are the only people who can testify and establish the existence of Fakrullah. It cannot be over emphasised that the respondent is innocent until proven guilty and he must be given every opportunity to substantiate his story. Without these material witnesses the respondent will not be able to do so. It is not a question of these three missing witnesses being “plugged from the air”; they were offered to the defence by the prosecution. The fact that the defence had already alerted the prosecution of their wish to call them makes it imperative for the prosecution to avail them. There is nothing unreasonable about this request. In addition to that, it was the testimony of the respondent that Abdul Rahman came to the house on that fateful night when the respondent together with Fakrullah left in a car bearing registration No. JCS 5739. Thus the evidence of Abdul Rahman is crucial to the respondent. **B**
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[26] It was obligatory for the prosecution to secure their attendance once they were offered as witnesses to the defence. Such failure had occasioned a miscarriage of justice. **F**

[27] We are of the view that the three missing witnesses are essential to the unfolding of the narrative of the defence story. A perusal of the record of the proceedings reveals that learned counsel for the respondent applied to recall the Investigating Officer, Chief Inspector Rejali, to ascertain, if during the course of his investigation, he has knowledge regarding Fakrullah and Abdul Rahman (p. 66 of the Appeal Record). **G**

[28] This application was objected by the learned deputy public prosecutor, and the learned High Court judge, consequently, refused the application to recall the investigating officer (p. 66 of the Appeal Record). Consequently, without their testimonies, there was a gap in the narrative of the story of the defence and this failure is attributable to the prosecution. **H**

[29] The testimonies of the three missing witnesses are to establish the existence of Fakrullah and the role he played. Without their testimonies, there will inevitably be doubts in the **I**

A prosecution case. In our criminal justice system, principles such as these are sacred and sacrosanct; for it is better that one guilty man be freed than that general principles evolved by the dictates of justice for the conduct of criminal prosecutions be disregarded or discredited. (See: *Maxwell v. DPP* [1934] All ER (Rep) 168.)

B **[30]** The result, therefore, is that we dismiss the appeal and we affirm the decision of the learned High Court judge in acquitting and discharging the respondent.

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